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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS *

In this Court, the Civil Service Commission has abandoned its positions previously taken in the district court and in the court of appeals on the two ultimate issues of adverse racial impact and proof of test validity. The Commission's brief in this Court acknowledges for the first time that the statistical data of record establishes that both Test 21 and the MPD's overall hiring practices have a substantial adverse racial impact. CSC Bf., pp. 16-19. The Commis-

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* This Supplemental Brief is being filed, pursuant to Rule 41(5) of the Rules of this Court, to respond to the Brief for the Civil Service Commission ("The Federal Respondents".) Although the brief for the Commission was due with the Petitioners' brief on November 20, 1975 (see Rule 21(4)), it was not filed until January 10, 1976, three weeks after the brief for Respondents had been filed. The Commission's brief makes arguments different from those of the Petitioners.

sion also acknowledges that the evidence submitted to the district court is inadequate to establish the validity of Test 21. Id., p. 22.

The Commission suggests, however, that the case be remanded to the district court to afford the defendants an opportunity to supplement their proof of validity.[1] This suggestion should be considered in light of the judgment of the court of appeals remanding the case for further proceedings relative to remedy. CA. 18-19. The scope of that remand certainly encompasses an examination of any changes that may have occurred in the MPD's testing or training policies subsequent to the decision in the district court, as well as any validation study that may have been conducted since that time. Thus, the opportunity of supplementing the evidence, in terms of updating it, is provided under the judgment of the court of appeals. The difference between the remand ordered by the court of appeals and that now suggested by the Commission is that the Commission still seeks to use the Futransky study to support the validity of Test 21. The Court of Appeals properly foreclosed this possibility.

[1] The Commission also suggests, with respect to the question of adverse racial impact, that the MPD be permitted, on remand, to attempt to show that the Department's supposed "special recruitment program, 'a significant portion of which [was] directed towards increasing the number of blacks in the department' . . . may have resulted in an atypical pool of black (or white) applicants." CSC Bf., p. 19. This suggestion ignores the data of record which clearly shows that there was no increase in the rate of black applicants during the period in which it is claimed there were special recruitment efforts, but that in fact there was a decrease. See Resp. Bf., pp. 6-7, n.10. Moreover, there was no change in the relative black and white performance on Test 21 after this special recruitment program was supposed to have begun. See Resp. Bf., p. 4, n.4, p. 24, n.30.

The position of the Commission with respect to remand assumes that Futransky established that Test 21 was predictive of recruit school success, as measured by the then existing recruit school examinations. Test 21 has not been proved valid, according to the Commission, solely because there is no evidence of the appropriateness of recruit school tests as measures of training performance and there is no evidence of the relevance of the training program to the job. CSC Bf., pp. 24-29. It is true that if a correlation were shown between applicant test scores and *success* in training as measured by training school examinations, it would then be necessary to establish that training school examinations were "*proper* measures of performance in a *job-relevant* training program." *Id.*, p. 29 (emphasis in original). But these questions do not even arise until a correlation between applicant tests scores and success in training has been shown, and it has not been shown in this case.

The question turns on the meaning of the word "success". Test 21 has not been shown to correlate with *success* in recruit school because all of the subjects of the Futransky Study succeeded in recruit school in the only sense that success in recruit training had ever been defined by the Department—satisfactory completion of the recruit school program (i.e., achieving recruit school exam scores over 75) in the established period. In focusing on recruit school averages above and below 85, Futransky was not correlating Test 21 performance with recruit school *success* in any meaningful sense, but with an arbitrary standard that he established and which has no demonstrated significance. The MPD has never made any distinction among

recruits based on recruit school test scores above or below 85.[2]

The Futransky Study would show a relationship between Test 21 scores and recruit school *success* only if it supported the inference that persons who scored below 40 on Test 21 would tend to fail recruit school. But the Study does not support such an inference. In support of its argument to the contrary, the Commission has referred to the professional principle of "linearity." CSC Bf., pp. 29-30, n. 27. This principle permits the inference, from a study restricted in range, that a significant pattern of performance within the range would continue outside the range absent the restriction.[3] The linearity principle, of course, does not support the assumption that performance *in a different pattern* will occur. The only assumption that can be drawn from the Futransky Study with respect to persons who score below 40 on Test 21 is that such persons would score in the 75-84 range in recruit school in greater proportions than do persons who achieve higher Test 21 scores. This is so because the pattern Futransky noted within the range was a trend toward averages between 75 and 84 with lower

[2] It might be argued, although neither the MPD nor the Commission does so, that the Futransky Study shows that Test 21 predicts success in training because scores over 85 in Recruit School represent a greater degree of success than scores between 75 and 84. But this could be established only if Recruit School scores above and below 85—which have no significance in terms of meeting training requirements—were shown to have some significance in terms of some subsequent performance criterion. Futransky found that scores above and below 85 on Recruit School exams do not significantly correlate with subsequent job performance. App. 106.

[3] A test validation study is restricted in range if all of the persons who take the test are not included in the group of persons whose subsequent performance is compared with the test results. Here, the range of the Futransky Study was necessarily limited to persons who scored above 40 on Test 21 because all others were rejected.

Test 21 scores. App. 103. Since the Futransky Study shows no trend with respect to failure in recruit school, and, as a matter of policy there is no such thing as failure in recruit school, the inference that persons scoring below 40 on Test 21 would fail recruit school cannot be drawn.

Furthermore, even if the Futransky Study could be thought to indicate that persons scoring below some level on Test 21 could not succeed in police training, there is no evidence in this record as to what that level may be, and, at least as of the close of the record in the district court, no study of this question had been made. Nothing in the Futransky Study supports the conclusion that the proper cutoff is a score of 40. See Resp. Bf., pp. 33-34. Indeed, Futransky found that more than half of the persons scoring in the range just above 40 on Test 21 scored above 85 in Recruit School and he rendered his opinion that persons scoring above 35 on Test 21 could successfully complete Recruit School.. App. 103.[4]

[4] The Commission asserts, for the first time in this litigation, that applicants to the MPD are ranked for consideration on the basis of their Test 21 scores. It then suggests that if the actual selections were made from among persons with Test 21 scores substantially above 40, the cutoff of 40 would have no significance. CSC Bf., pp. 2-3, 33-34, n. 31. The basis of the suggestion of ranking is several Civil Service Commission regulations having no particular relation to the MPD. 5 C.F.R. 332.401-04. By contrast, the MPD's response to interrogatories in this case makes explicit that Test 21 is administered on a pass/fail basis and that no distinction is made among test passers in subsequent stages of the screening process. App. 35. The district court and the court of appeals so found. CA 4, 48. Moreover, the argument is of no help to the defendants because if, hypothetically, only persons scoring above 50 on Test 21 were actually considered for employment, then 50 would constitute the effective cutoff score, and it would have to be shown valid. And, of course, the higher the cutoff score the more difficult it would be to sustain the proposition that persons excluded by Test 21 could not succeed in training.

Since the Futransky Study does not show that a score of 40 on Test 21 correlates with success in training, the areas of additional proof suggested by the Commission cannot cure the defects in the attempt to show validity.[5] The judgment of the court of appeals, which decided the issue of liability on the existing record and remanded for further proceedings relative to remedy, should be affirmed.

Respectfully submitted,

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[5] It would be particularly inappropriate to remand for further litigation concerning the value of the Futransky Study in light of the Department's abandonment of the Recruit School examinations on which the Futransky correlation is based. See Resp. Bf., pp. 12-13, 35-36.